

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 19, 2007

**REGINOL L. WATERS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2000-C-1267     Steve Dozier, Judge**

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**No. M2006-01687-CCA-R3-CO - Filed January 16, 2008**

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The Appellant, Reginol L. Waters, appeals the summary dismissal of his *pro se* petition for the writ of error *coram nobis* by the Davidson County Criminal Court. In his petition, Waters alleged the existence of newly discovered evidence in the form of a “fraud upon the court” perpetrated by the trial court, the State, and defense counsel. On appeal, Waters argues that the *coram nobis* court erred in summarily dismissing the petition as untimely and, further, that the court was required to recuse itself from the *coram nobis* proceedings. Following review, we affirm dismissal of the petition.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Reginol L. Waters, *Pro se*, Whiteville, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Alice B. Lustre, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Factual Background**

In 2001, a Davidson County jury convicted the Appellant of two counts of aggravated rape, one count of aggravated robbery, and one count of aggravated burglary. The pertinent facts underlying these crimes were recited as follows by this court on direct appeal:

The victim . . . , a college student, testified that on April 24, 2000, at approximately midnight, she heard someone outside her apartment. She thought it was her neighbor and walked outside. Instead, she saw the [Appellant] standing outside of a storage closet; she re-entered her apartment. Later, she looked outside

and saw the [Appellant] sitting inside a green pickup truck parked in the parking lot of her apartment complex. [The victim] stated that she and the [Appellant] made eye contact, and she saw his face.

[The victim] testified that approximately two hours later, she heard a noise while she was in her living room watching a movie. She looked up and saw the [Appellant] running down the hallway of her apartment toward her. [The victim] described him as a large black man with light freckles, wearing white clothing and a cloth across the bottom half of his face. The [Appellant] was holding a knife with a serrated edge and flecks of white drywall or paint on it.

[The victim] stated that the [Appellant] threatened to hurt her if she screamed, stuffed a sock into her mouth, and wrapped masking tape around her head while pointing the knife toward her throat. [The victim] pulled the sock out of her mouth and begged the [Appellant] not to hurt her. [The victim] stated the [Appellant]'s cloth fell below his nose, and she saw his entire face above his mouth.

. . . .

When [the victim] did not find any money in her wallet, she gave the [Appellant] her debit card. [The victim] also wrote down her PIN number on a notice from her pet's veterinarian and gave it to the [Appellant]. . . . The [Appellant] pulled the cloth down from his face, and she saw his face before he pulled the cloth back over his nose.

. . . .

[The victim] testified that she pretended to vomit because she thought the [Appellant] would leave her alone. Instead, the [Appellant] came into the bathroom and forced [the victim] down on her knees. He held a knife to her face and threatened to kill her if she did not perform oral sex on him. As [the victim] was performing oral sex on the [Appellant], she bit him and ran toward the door. . . . [The victim] testified that the [Appellant] then grabbed the masking tape that was still around her neck, twisted it, and pulled it up until she could not breathe. . . . [The victim] stated she again attempted to escape, but the [Appellant] twisted the masking tape tighter until she was choking.

The [Appellant] then pushed [the victim] on her back and straddled her. He placed his legs on [the victim]'s shoulders and again forced her to perform oral sex on him. As he held a knife to her neck, the [Appellant] threatened to kill her if she did not swallow, and he ejaculated into her mouth. . . .

The [Appellant] then demanded [the victim] tell him how to use the debit card. [The victim] testified the [Appellant] pulled the cloth beneath his mouth, and she again saw his face before he pulled it over his nose.

....

Sergeant Edwin Allen Groves testified that based upon [the victim]’s description of her attacker, he apprehended the [Appellant], who was sitting in a green pickup truck parked in front of a Suntrust Bank. Officer James Pearce testified a “showup” was conducted at the scene where the [Appellant] was apprehended, and [the victim] identified the [Appellant] as her attacker. Officer Scott Cothran stated he searched the [Appellant]’s vehicle at the scene and found [the victim]’s debit card, the knife, and the cloth the [Appellant] wore on his face. Detective Keith Sutherland stated he later searched the vehicle and found the piece of paper on which [the victim] wrote her PIN number. Detective Sutherland and Officer Gene Martin testified they interviewed the [Appellant], who eventually confessed to committing the offenses.

*State v. Reginol L. Waters*, No. M2001-02682-CCA-R3-CD (Tenn. Crim. App. at Nashville, Jan. 30, 2003), *perm. app. denied*, (Tenn. June 2, 2003).

The trial court sentenced the Appellant, as a Range I offender, to twenty-three years for the first count of aggravated rape, twenty-five years for the second count of aggravated rape, ten years for aggravated robbery, and, as a Range II offender, to ten years for aggravated burglary. The trial court further ordered the two sentences for aggravated rape and the sentence for aggravated burglary be served consecutively and the sentence for aggravated robbery be served concurrently, for an effective sentence of fifty-eight years. The convictions and sentences were affirmed by this court on direct appeal. *Reginol L. Waters*, No. M2001-02682-CCA-R3-CD.

While his direct appeal was pending, the Appellant filed a petition seeking forensic analysis of DNA evidence pursuant to Tennessee Code Annotated section 40-30-403. The post-conviction court initially dismissed the petition on the grounds that it could not be pursued during the pendency of the direct appeal. This court reversed and remanded, concluding that there was no such procedural barrier to the petition. *Reginol L. Waters v. State*, No. M2002-01712-CCA-R3-CO (Tenn. Crim. App. at Nashville, Mar. 14, 2003). On remand, the post-conviction court summarily dismissed the petition, ruling that the Appellant could not satisfy the requirements of the statute. The judgment of the post-conviction court was affirmed on appeal. *Reginol L. Waters v. State*, No. M2003-01870-CCA-R3-CO (Tenn. Crim. App. at Nashville, Feb. 11, 2005), *perm. app. denied*, (Tenn. May 23, 2005). The Appellant subsequently filed a petition for post-conviction relief, alleging ineffective assistance of counsel, which was denied by the post-conviction court. This judgment was similarly affirmed by this court on appeal. *Reginol L. Waters v. State*, No. M2005-02009-CCA-R3-PC (Tenn. Crim. App. at Nashville, May 22, 2006), *perm. app. denied*, (Tenn. Aug. 7, 2006).

The Appellant filed the instant petition for the writ of error *coram nobis* on March 30, 2006, alleging the existence of newly discovered evidence. On June 2, 2006, the trial court entered an order summarily dismissing the petition as untimely. The Appellant, proceeding *pro se*, filed a timely notice of appeal to this court.

### Analysis

On appeal, the Appellant asserts that the trial court erred in summarily dismissing his petition for the writ of error *coram nobis* upon the ground that it was barred by the statute of limitations. First, the Appellant argues that the statute of limitations corresponding to his petition did not begin to run until the entry of an order denying his most recent petition for post-conviction relief. Alternatively, he argues that the State did not raise the statute of limitations below as an affirmative defense to his petition for *coram nobis* relief. The Appellant further argues, citing *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001), that even if his petition were filed outside of the statute of limitations, due process required a tolling of the statutory bar in this case and a hearing by the trial court on the assertions set forth in his petition.

In his petition for the writ of error *coram nobis*, the Appellant alleges that the trial court, the State, and defense counsel

knowingly and intentionally conspired to commit ‘fraud upon the court,’ consisting of a discrete act, to conceal favorable information, defrauded to correct false testimony given by prosecution witnesses, conspired to use false evidence to convict the petitioner and made finding of facts and conclusion of law which displayed a deep-seated favoritism or antagonism that would make fair judgment impossible.

The petition identifies as the information concealed: (1) the 911 tape of the reported crime by the victim; and (2) the taped interview of the Appellant during police questioning.

The petition asserts that the 911 tape, which he contends was intentionally withheld from the jury at trial, would have established that the victim informed the investigating officers that her assailant was a “‘lightskinned’ black man despite the fact that [the victim ’s] supplemental report and the 911 tape states she said a black man.” With regard to the Appellant’s taped statement during police questioning, the petition asserts that introduction of the statement, which he contends was also intentionally withheld from evidence, would have established that the Appellant “exercise[d] his *Miranda* rights to silent (sic) and to counsel. . . .” The petition further alleges that in the absence of these two items of evidence, the prosecution was allowed to introduce perjured testimony which “was contrary to that of the cassette interrogation and 911 admission tapes.” The petition contends that the trial judge’s complicity in the conspiracy stems from the judge’s suppression of portions of the recordings because the suppressed portions “reflected unfavorably” upon the police and others. The petition alleges that trial counsel’s complicity is based upon the fact that counsel “failed to present [the Appellant’s] primary line of defense. . . .” and made no attempts to prevent the introduction of perjured police testimony.

A writ of error *coram nobis* is an extraordinary remedy by which the trial court may provide relief from a judgment under narrow and limited circumstances. *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999). The remedy is available by statute to a criminal defendant in Tennessee. T.C.A. § 40-26-105 (2003). This statute provides, in pertinent part:

The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error *coram nobis* will lie for subsequently or newly discovered evidence relating to matters which were litigated at trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

*Id.* Thus, in order to be entitled to a new trial based upon newly discovered evidence, a defendant must show that he exercised due diligence, that the newly discovered evidence is material, and that it would likely change the result if produced and accepted by a jury. *Newsome v. State*, 995 S.W.2d 129, 133 (Tenn. Crim. App. 1998). The “purpose of this remedy ‘is to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment.’” *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting *State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (1966)). The decision to grant or deny a petition for writ of error *coram nobis* based on newly discovered evidence lies within the sound discretion of the trial court. T.C.A. § 40-26-105; *Hart*, 911 S.W.2d at 375.

A petition for the writ of error *coram nobis* must be dismissed as untimely unless it is filed within one year of the date on which the judgment became final in the trial court. T.C.A. §§ 40-26-105; 27-7-103 (2003); *Mixon*, 983 S.W.2d at 670. The statute of limitations applicable to writs of error *coram nobis* is an affirmative defense which must be specifically pled by the State or it is deemed waived. *Harris v. State*, 102 S.W.3d 587, 593 (Tenn. 2003); *Newsome v. State*, 995 S.W.2d 129, 133 n.5 (Tenn. Crim. App. 1998).

In response to the State’s position on appeal that the petition was filed outside the statute of limitations, the Appellant argues that his petition was timely because it was filed within one year of the judgment order dismissing his most recent petition for post-conviction relief in 2005. This argument is misplaced. The record demonstrates that the trial court entered judgments on the convictions on August 3, 2001. It is unclear from the record whether any post-trial motions were filed as to these judgments, however, the instant petition for *coram nobis* relief was filed on March 30, 2006. We agree with the State that the order denying post-conviction relief had no effect on the applicable statute of limitations in this case.

The record does not contain a response by the State to the Appellant's petition, and the State does not now appear to dispute that it did not raise the statute of limitations below. Despite this fact, the trial court summarily dismissed the petition as untimely.<sup>1</sup> Accordingly, we agree with the Appellant and conclude that the trial court erred by summarily dismissing the petition on the basis that it was time-barred because the statute of limitations applicable to writs of error *coram nobis* is an affirmative defense which must be specifically pled or is deemed waived. See *Harris*, 102 S.W.3d at 593; *Newsome*, 995 S.W.2d at 133 n.5; *Bruce Alan Littleton v. State*, No. M2006-01675-CCA-R3-CO, (Tenn. Crim. App. at Nashville, Mar. 14, 2007).

Nonetheless, we conclude that because the Appellant has failed to allege the existence of subsequently or newly discovered evidence that would warrant relief under a writ of error *coram nobis*, summary dismissal of his petition was proper in this case.<sup>2</sup> His present argument, regarding the tape recording involving the invocation of Miranda rights during interrogation, has previously been raised by the Appellant and rejected by this court on direct appeal.<sup>3</sup> *Reginol L. Waters*, No. M2001-02682-CCA-R3-CD (concluding that the Appellant had waived this issue, finding no plain error as to this issue, and concluding that even if admission of the Appellant's subsequent statements were error that it was harmless beyond a reasonable doubt in light of the overwhelming evidence of his guilt). Furthermore, the allegedly inconsistent physical descriptions of the perpetrator now cited by the Appellant as "newly discovered evidence" were also previously raised by him and consequently rejected in post-conviction proceedings which were affirmed by this court on appeal. *Reginol L. Waters v. State*, No. M2005-02009-CCA-R3-PC. It is fundamental that "[t]he [*coram nobis*] proceeding is confined to errors outside the record and to matters which were not and could not have been litigated at trial, the motion for new trial, appeal, or upon post-conviction petition." *Kenneth C. Stomm v. State*, No. 03-C-01-9110-CR-00342 (Tenn. Crim. App. at Knoxville, May 12, 1992); see also T.C.A. § 40-26-105; *Johnson v. Russell*, 404 S.W.2d 471 (Tenn. 1966); *Teague v. State*, 772 S.W.2d 915, 920 (Tenn. Crim. App. 1988). Here, the facts underlying the alleged errors were not only known to the Appellant prior to trial but were the subjects of litigation at trial and on appeal. Accordingly, the Appellant is not entitled to relief.

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<sup>1</sup>In dismissing the petition presently at issue, the trial court held that the judgments of conviction became final for *coram nobis* purposes on June 2, 2003, when the supreme court denied *certiorari* of this court's affirmance of the convictions on direct appeal. The trial court proceeded to run the one-year statute of limitations from that date, concluding that the claim was barred as of June 3, 2004. However, in *Mixon*, our supreme court explicitly rejected the argument that the *coram nobis* statute does not begin to run until the conclusion of the appeal as of right proceedings. Instead, the court held that, as to a petition for writ of *coram nobis*, "[a] judgment becomes final in the trial court thirty days after its entry if no post-trial motions are filed" and "[i]f a post-trial motion is timely filed, the judgment becomes final upon entry of an order disposing of the post-trial motion." *Mixon*, 983 S.W.2d at 670 (citing Tenn. R. App. P. 4(c); *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)).

<sup>2</sup>Moreover, because we conclude that the trial court's summary dismissal of the petition is sustainable despite the State's failure to raise the statute of limitations below, his reliance upon *Workman* in support of tolling the statute of limitations is inapplicable in this case.

<sup>3</sup>This court may take judicial notice of its own records. See Tenn. R. App. P. 13(c); *James William Dash v. Howard W. Carlton, Warden*, No. E2001-02867-CCA-R3-PC (Tenn. Crim. App. at Knoxville, Sept. 11, 2001).

Finally, the Appellant argues that his rights were violated under the Tennessee constitution based upon the trial court's failure to recuse itself from the *coram nobis* proceedings below. He contends that the trial court "participated in the post-conviction hearing, interrogated the [P]etitioner and heard testimony from the State's witnesses and by doing so, he became . . . in effect, a witness to the disputed facts concerning this proceeding . . . ." The Appellant cites the trial court's judgments rendered against him on his previously filed petitions for post-conviction relief as proof of bias or prejudice.

"A motion for recusal based upon the alleged bias or prejudice of the trial judge addresses itself to the sound discretion of the trial court and will not be reversed on appeal unless clear abuse appears on the face of the record." *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995). We conclude that the Appellant has failed to make such a showing in this case. Moreover, we note that "[a] judge is in no way disqualified because he tried and made certain findings in previous litigation." *Id.* Accordingly, this argument is without merit.

### **CONCLUSION**

Based upon the foregoing, the judgment of the Davidson County Criminal Court is affirmed.

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DAVID G. HAYES, JUDGE